LWD, Inc., LWD Sanitary Landfill, Inc. and LWD Trucking, Inc. *and* District Lodge 154 of the International Association of Machinists and Aerospace Workers, AFL–CIO, CLC. Case 26–CA–14376

October 13, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On June 9, 1992, Administrative Law Judge Richard A. Scully issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, LWD, Inc., LWD Sanitary Landfill, Inc. and LWD Trucking, Inc., a single integrated enterprise and single employer, with offices and facilities in Calvert City, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

''(b) Offer David Downs and Franklin Elkins immediate and full reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest. Backpay and interest shall be computed in the manner described in the remedy section of the judge's decision.

2. Substitute the following for paragraph 2(c).

''(c) Remove from its records any reference to the unlawful disciplinary warning issued to David Downs on December 4, 1990, and to the unlawful layoff of David Downs and Franklin Elkins on February 26, 1991, and notify them in writing that this has been done and that the warning and the layoff will not be used against them in any way.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain a rule prohibiting our employees from discussing the amount of their paychecks with other employees.

WE WILL NOT threaten our employees with retaliation because they engage in union or other protected activities.

WE WILL NOT lay off our employees in order to retaliate against them because they engage in union or other protected activities.

WE WILL NOT issue disciplinary warnings to employees because of their union or other protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has excepted to the judge's discrediting of its witnesses Amos Shelton, Larry Howell, and Danny Burnett concerning the reasons for selecting David Downs and Franklin Elkins for layoff, contending that the judge erred in stating that their testimony was ''without corroboration.'' In affirming the judge's finding that the Respondent had not established by credible evidence that it would have taken the same action in the absence of its employees' protected activity, we do not rely on the judge's statement concerning lack of corroboration. Rather, we find that the other reasons stated by the judge for discrediting these witnesses are supported by the record and provide a sufficient basis for affirming the findings.

Additionally, the Respondent alleges that the judge is biased in favor of the Union and against the Respondent, and that because of this the Respondent has been deprived of due process. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

[2] We shall modify the judge's recommended Order and substitute a new notice to conform to the judge's findings and conclusions of law.

WE WILL rescind the rule in our employee handbook prohibiting employees from discussing the amount of their paychecks with other employees.

WE WILL offer David Downs and Franklin Elkins immediate and full reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting from their permanent layoff, plus interest.

WE WILL remove from our files any reference to the disciplinary warning issued to David Downs on December 4, 1990, and the layoff of David Downs and Franklin Elkins on February 26, 1991, and WE WILL notify them in writing that this has been done and that the warning and layoff will not be used against them in any way.

LWD, INC., LWD SANITARY LANDFILL, INC. AND LWD TRUCKING, INC.

Susan B. Greenberg, Esq. and *Margaret G. Brakebusch, Esq.*, for the General Counsel.

Grover C. Potts Jr., Esq., of Louisville, Kentucky, and *Mark H. Floyd, Esq.*, of Nashville, Tennessee, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. On a charge filed by District Lodge 154 of the International Association of Machinists and Aerospace Workers, AFL–CIO, CLC (the Union) on March 20, 1991, and amended charges filed on May 6 and July 8, 1991, the Regional Director for Region 26, National Labor Relations Board (the Board), issued a complaint on May 6 and an amended complaint on July 9, 1991, alleging that the Respondent committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed timely answers denying that it had committed any violation of the Act.

A hearing was held in Calvert City, Kentucky, on August 5 through 7, 1991, at which all parties were given a full opportunity to participate, to examine and cross-examine witnesses, and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration. On the entire record and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

LWD, Inc., LWD Sanitary Landfill, Inc. and LWD Trucking, Inc. (the Respondent) constitute a single-integrated business enterprise and single employer with offices and facilities in Calvert City, Kentucky, where it is engaged in the business of transporting, storing, and disposing of hazardous and nonhazardous liquid and solid waste. During the 12-month period preceding May 1991, the Respondent, in the course and conduct of its business operations, performed services valued in excess of $50,000 for various enterprises located outside of the Commonwealth of Kentucky and purchased and received at its facilities products, goods, and materials valued in excess of $50,000 directly from points located outside the Commonwealth of Kentucky. The Respondent admits, and I find, that at all times material it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that at all times material the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

During the summer of 1990, employees of the Respondent contacted two different unions concerning possible representation. Wade Parrent obtained authorization cards from the Union at about the same time David Downs got cards from the Operating Engineers in Paducah, Kentucky. After discussing it, they decided to go with the Union which already represented employees of several plants in the Calvert City area. Downs returned the cards to the Operating Engineers and they began soliciting for the Union in mid-June. On June 22, 1990,[1] the Union filed a petition with the Board in Case 26–RC–7289, seeking to represent the Respondent's production and maintenance employees. An election was held on August 10 which the Union lost by a vote of 75 to 72. This was the third unsuccessful attempt to organize the Respondent's employees, the next most recent having been in 1984/1985 by the United Auto Workers.

B. *The 8(a)(1) Allegations*

1. Prohibiting discussion of paychecks

The amended complaint alleges that the Respondent enforced a rule promulgated in its employee handbook which prohibits the discussion of wages among its employees. The Respondent's handbook is given to each employee at the time of hiring. The section of the handbook entitled ''Your Payday'' contains the following statement:

> The amount of your paycheck is a confidential matter between you and the managers of LWD, Inc. Please do not discuss it with any employee of the company other than your supervisor or plant manager.

Counsel for the General Counsel presented no evidence concerning this rule beyond the fact that it appears in the handbook.

Company President Amos H. Shelton Jr. testified that the rule was instituted because some employees were exaggerating the amounts of bonuses they had received. He said the rule simply means that the amount of an employee's paycheck is a personal matter which the employee is free to disclose if he chooses and that ''supervisors are not to be telling

[1] Hereinafter, all dates are in 1990 unless otherwise indicated.

or discussing someone else's paycheck.'' According to Shelton, if an employee wants ''to show and tell'' others what he makes, the Respondent has ''no problem'' with that. The Respondent also argues that there was no proof that the rule has ever been enforced.

The rule is a part of the handbook which all employees are given when hired. They are required to read the handbook, to sign it, and to agree to observe the personnel policies and rules outlined therein as a condition of continued employment with the Respondent. Regardless of whether any action has been taken to enforce the rule, its existence ''constitutes a clear restraint on the employees' Section 7 right to engage in concerted activities for mutual aid and protection concerning an undeniably significant term of employment.'' *Heck's, Inc*., 293 NLRB 1111, 1119 (1989); *Triana Industries*, 245 NLRB 1258 (1979). In the absence of any evidence that it caused any significant disruption of the Respondent's operations, the mere fact that some employees may have exaggerated the amounts of bonuses they received cannot qualify as sufficient business justification for interference with their rights. Moreover, the rule, as written, applies to all wages not just the amount of bonuses and to all employees not just supervisors. Thus, it is broader than is necessary to achieve the alleged objective. *Service Merchandise Co*., 299 NLRB 1125 (1990). There is no evidence that employees were ever informed that the Respondent had ''no problem'' with their discussing the amount of their paychecks. I find that by maintaining the employee handbook provision requesting that employees not discuss their paychecks with other employees, the Respondent unlawfully restrained and interfered with the employees' rights in violation of Section 8(a)(1) of the Act. *Radisson Plaza Minneapolis*, 307 NLRB 1 (1992); *Heck's, Inc*., supra.

2. Threats and coercive statements

David Downs was one of the leaders of the Union's attempt to organize the Respondent's employees. He solicited signatures on authorization cards, distributed handbills at the plant, campaigned on the road outside the plant on the day preceding the election and on the day of the election after having been ordered to leave the company property that morning by Shelton, attended the preelection conference, and served as an alternative election observer for the Union. On July 21, Downs was injured at work, apparently, as the result of inhaling fumes from a chemical spill that occurred when he was attempting to clear a malfunctioning pump. Downs was hospitalized for 5 days. After he was released to return to work by his physician, Downs so informed the Respondent but was told he would have to be cleared by the company physician before he could return. The company physician wanted him to remain off for an additional period and cleared him to return to work as of August 14.

Downs presented his release to Production Foreman Danny Burnett who told him he would have to meet with Shelton before he could return to work. At a meeting with Shelton and other management personnel, Downs credibly testified that he was told by Shelton that since he had a more severe reaction to the chemical fumes than two other employees who had inhaled them, he could not return to work until Shelton was satisfied as to why their reactions had differed. Downs responded that he had been cleared to return to work and could no longer collect workmen's compensation. Shelton told him to consider himself laid off. Later the same day, Shelton informed Downs that he had made a mistake and that Downs should report for work the next morning.

Prior to his injury, Downs had been a Class A furnace operator, but when he returned to work on August 15, he was assigned to a labor gang, doing work such as sweeping floors. Later, he was assigned to the landfill where he operated a weedeater. He was eventually moved back to the plant, but continued to work as a laborer. When he was put on the labor gang, Downs contacted the Union which filed a charge with the Board on his behalf. Union Representative Joe Sills testified that he subsequently withdrew that and other charges after working out a agreement with Shelton which provided, inter alia, that Downs would be returned to his previous position as a Class A operator. After Downs informed him that he had not been returned to the operator position, Sills contacted Shelton and said he would refile the charges if the Respondent did not honor the agreement.

Downs testified that in October, while working on the labor gang, he was summoned to meet with Shelton in the office where management officials Larry Howell, Gautam Trivedi, and Gary Metcalf were also present. Shelton entered the office, put a tape recorder on the table, turned it on, and said, ''The first thing I'm going to ask you, just what kind of fucking deal do you have with Joe Sills?'' Downs responded that he understood that it was Shelton and Sills that had the deal. Shelton then said that it had been brought to his attention that Downs wanted to return to his job as a Class A operator and that he could do so, but on Shelton's conditions. One condition was that Downs was going to be watched and by his ''first mistake,'' he was ''signing his own resignation.'' Downs was put back to work as a Class A operator on October 22. The complaint alleges that Shelton's remark violated Section 8(a)(1) of the Act.

Shelton was not specifically asked about this meeting with Downs but did testify that when Downs was moved back to the furnace room he was told that ''we was going to watch him severely.'' This was because Downs had stated that he ''was taking some sort of breathing therapy'' that did not show up in the Respondent's records and Shelton wanted to be sure that he did not ''have any kind of abnormal feelings, dizziness or otherwise'' which might result in injury to himself or others because of a reaction to something. Gautam Trivedi testified that he did not recall hearing Shelton say that Downs would be watched and that his first mistake would result in his resignation or words to that effect at the meeting. He also did not recall hearing Shelton ask Downs ''what kind of fucking deal do you and Joe Sills have?'' Gary Metcalf testified that at the meeting Shelton asked Downs whether he was capable of doing the job of a furnace operator and Downs responded that he was. Shelton said that Downs could return to the furnace room but had to let them know if he had any problems. He did not remember Shelton making any other statements of any significance to Downs at the meeting.

I credit the testimony of Downs concerning what Shelton said during the meeting. None of the others present contradicted Downs' testimony that Shelton tape recorded what was said at this meeting. The Respondent did not produce the tape or offer any explanation why it could not do so. I infer that the tape would not have supported the Respondent's version of what Shelton said at the meeting. More sig-

nificant was Shelton's failure to specifically deny the statements attributed to him by Downs. His general testimony concerning what Downs was told at the time he was returned to the furnace room, including that he would be severely watched, did not contradict Downs' testimony about this incident. His claim that he was concerned at the time because Downs was undergoing ''breathing therapy'' appears to be a fabrication. Downs denied ever receiving any such therapy and neither Trivedi nor Metcalf testified to hearing Shelton mention it. I do not find the lack of recollection by Trivedi and Metcalf as to hearing the statements attributed to Shelton by Downs equivalent to a denial that they were made or otherwise sufficient to contradict Downs' credible testimony about the incident. Considering all of the circumstances, including the fact that I find the evidence establishes that Downs was not returned to the furnace room immediately on being released to return to work by the Company's physician but was given a series of menial jobs and was given a disciplinary warning, all because of his support for the Union, discussed infra, and the fact that at the same meeting Shelton made a derogatory reference to Downs' association with Union Representative Sills, who had contacted Shelton concerning returning Downs to the furnace room, I find that Shelton's statement that Downs would be watched and his first mistake would constitute signing his resignation was a threat of retaliation for his union support and violated Section 8(a)(1). *Larid Printing*, 264 NLRB 369, 370 (1982).

On December 4, Downs was given a written correction for an incident on November 21 in which a hose he had unhooked resulted in a spill. Kelly McMakin, who was the shift leader at the time of the incident, was also given a written correction. McMakin had been an active and visible supporter of the Union prior to the election. Downs and McMakin protested when given the corrections by Burnett and refused to sign them. They went first to Howell and eventually to Shelton when he came into the office. Downs testified that after Shelton entered Howell's office and they began to discuss the matter McMakin said to Shelton, ''if we had had a job description here, I feel like this never would have happened.'' Shelton responded, ''as long as I run this fucking company, there will be never be job description[s], union or no union.'' He went on to say ''and another thing, about the union election, I hold no grudges at all about the election, that election meant nothing to me.'' Then he said, ''I'm not going to sit here and say that. Yes, by God, I do hold grudges.'' The meeting ended with Shelton refusing to rescind the written corrections. The complaint alleges that Shelton's comments violated Section 8(a)(1).

I find Downs' testimony about what occurred at the meeting to be credible and essentially uncontradicted even though at least five supervisory or managerial employees were present and all testified at the hearing. Most significant was the fact that Shelton testified about the meeting and did not deny making the statements attributed to him by Downs. McMakin, who was promoted to a supervisory position prior to the hearing, and Shift Supervisor Joe Payne appeared as witnesses for the Respondent but were not asked about the specific comments in question. I do not consider the fact that they did not mention these statements in their descriptions of what occurred to be evidence that Shelton did not make them. Neither purported to give a verbatim account of what was said at the meeting which, according to the testimony, lasted over 2 hours. Interestingly, Payne did recall that McMakin raised the subject of a ''job description'' with Shelton which Downs testified led to Shelton's comments about the union election. Howell was asked if the Union was mentioned during the meeting and said that it was not. I do not credit his testimony as I did not find him to be a believeable witness. Much of his testimony seemed to have been rehearsed and in this instance he couldn't even wait for the question to be finished before speaking his denial. I find that Shelton made the statements attributed to him by Downs.

The Respondent argues that even if Shelton made these statements there was no violation because he was merely expressing general hostility towards the Union. I do not agree. By telling two employees he knew to be union supporters, in the context of a meeting in which disciplinary warnings were being issued, that he held ''a grudge'' because his employees had sought to exercise rights guaranteed them by the Act, Shelton went beyond expressing his opposition to unionization, a subject which he interjected, and impliedly threatened to retaliate against the employees for engaging in protected activity. His statement violated Section 8(a)(1). *Tufts Bros., Inc*., 235 NLRB 808, 814–815 (1978).

During February 1991, David Downs was laid off for 2 days. Downs was working as a furnace operator and the furnaces were being shut down for maintenance. Downs testified that when he was informed of this layoff by Supervisor Joe Payne he asked Payne why employees with less seniority than himself and two others, who were being laid off, continued to work. Payne responded, ''don't tell me that you're that damn dumb that you don't know what's going on.'' The complaint alleges that Payne's remark violated Section 8(a)(1).

Payne was not asked about the statement attributed to him by Downs, but he did in effect deny it by describing what he did say to Downs—that the reason for the layoff was a reduction in force while the furnaces were down—and by saying that he had said nothing else. While I credit Downs' testimony about this incident based on the demeanor of the two witnesses, I do not find that Payne's remark violated the Act. There was no evidence that this layoff was the result of anything other than normal maintenance operations. There was no allegation in the complaint that it was discriminatory or done in retaliation for protected activity. Payne made no reference of any kind to the Union, Downs' activity during the campaign, or anything that had occurred since his return to work. The evidence indicates that the furnaces were being shut down for cleaning and that the three persons who were being laid off were furnace operators for whom there would be nothing to do when they were out of service, while those who were not laid off were laborers who were to do the cleaning. Considering all the circumstances, I find no reasonable basis for concluding that Payne's answer to Downs' question meant or implied that he was selected for layoff because of protected activity on his part. There was nothing to indicate that Payne's remark was anything but an expression of his personal opinion as to the merits of the question. It may have been rude, but it was not unlawful. See *Gorman Machine Corp*., 257 NLRB 51, 52 (1981). I shall recommend that this allegation be dismissed.

The complaint alleges that Supervisor Nathan Salyers told an employee that he would not be considered for a wage in-

crease because of the employee's membership in and support of the Union. Franklin Elkins was employed in the furnace room during the election campaign. He testified that he signed a union authorization card, attended meetings, wore union insignia and stickers on his uniform and hardhat while on the job and while attending antiunion films shown at the plant. During the campaign he had played on the company softball team in a championship game wearing a union shirt and cap. He was shown in a team photograph which appeared in the local newspaper wearing that shirt and cap. On the day preceding the election, he participated in a union rally held on the road outside the plant. On the same day, he was told by Burnett to leave a parking lot at the plant where was walking and holding a prounion sign. The Union filed a charge with the Board as a result of that incident. On the morning of the election, he attempted to hand out union pamphlets at the plant near the timeclock, but was ordered to leave by Shelton. Elkins testified that in late July he was called to Howell's office where Howell, Metcalf, and Shelton were present. Shelton told him that he wanted to talk to him about something he ''had been saying at the Union'' and that he was going to tape-record the conversation. Elkins said he did not object and Shelton turned on the recorder. Shelton first questioned him about having gone to the medical clinic for treatment of a rash Elkins said he thought was work related. He then began discussing ''rumors'' and said that he had heard that Elkins had been talking in public about things that went on at the plant. Shelton said that he did not appreciate it and that Elkins was not supposed to be talking about such things ''out to the open public.'' He described Shelton as being ''pretty mad'' based on his looks and tone of voice. He testified that the only comments about the plant he had made outside it involved safety concerns he had voiced at a closed meeting at the union hall when they were trying to get the Union to organize the employees. Elkins also testified that after the election he was called outside the control room by his supervisor, Nathan Salyers, who told him that he was a good worker but that Shelton ''is going to be out to get you over the election.''

The foregoing testimony by Elkins was credible and uncontradicted. It is against this background that the complaint allegation concerning a remark that Salyers made to Elkins must be evaluated. Elkins credibly testified that some time after he received a scheduled wage increase in September he asked Salyers to recommend him for another raise. Salyers told him that his name ''was real hard to bring up because of all the stuff [he] was involved in.'' When asked what Salyers meant by this, Elkins said: ''He was just talking about my activity with the Union, you know, because I was real active with that and he said my name would be hard to bring up.'' It is not clear from this whether Salyers actually mentioned Elkins' activity on behalf of the Union or not. However, under the circumstances, I find it makes no difference. For his part Salyers testified that Elkins had approached him about pay raises and they had discussed the subject on more than one occasion. While he said that he did not remember all of the conversations, he failed to describe any of them. Consequently, his testimony does not contradict that of Elkins or serve to clarify what he said. It was Salyers who had told Elkins a short time before that he considered him to be a good employee but that Shelton was out to get him ''over the election.'' Since he had no problem with Elkins' work, Salyer's statement obviously referred to Shelton's hostility towards Elkins because of his activities on behalf of the Union during the election campaign. There is no other reasonable explanation. These factors clearly distinguish the present case from those cited by the Respondent, *J. S. Dillon & Sons Stores v. NLRB*, 338 F.2d 395, 399 (10th Cir. 1964), and *Alchris Corp*., 301 NLRB 182 (1991), where the allegedly coercive remarks were held to not relate to protected activity. Here, telling Elkins that he was an unpopular subject to bring up with management because he had engaged in protected activity, disparaged his involvement with the Union and impliedly threatened him with retaliation in violation of Section 8(a)(1). *Precision Founders*, 278 NLRB 544, 549 (1986).[2]

C. *The 8(a)(3) Allegations*

The complaint alleges that a disciplinary warning given to David Downs on December 4 and the layoff of Downs and Franklin Elkins in February 1991 were in retaliation for their having supported the Union and violated Section 8(a)(1) and (3) of the Act. The Respondent contends that it did not discriminate against them, that the warning given to Downs was the result of a rules violation, that the layoff was the result of circumstances completely unrelated to the Union's organizing campaign, and that Downs and Elkins were selected for layoff based on their work records and without regard to any protected activity on the part of either.

In cases such as this, where the employer's motivation for taking certain actions is in issue, those actions must be analyzed in accordance with the test outlined by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once that has been done, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of protected conduct on the part of its employees.

The evidence is clear that both Downs and Elkins openly actively supported the Union during the election campaign and that the Respondent was aware of their support. Shelton admitted that he knew that they were prominent supporters of the Union, that he had asked both to leave company property when they attempted to demonstrate for the Union there on the morning of the election, and that he knew that Downs was an election observer for the Union.

1. Additional evidence of union animus

The record contains ample evidence of union animus on the part of the Respondent. The handbook given to all employees before at the time they start to work informs them that the Respondent does not feel that a union could help its

[2] While Salyers did not actually say that Elkins ''would not be considered for a wage increase'' because of his support for the Union, what he did say was equally coercive and unlawful. The complaint allegation was sufficient to put the Respondent on notice as to the nature of Salyers' coercive remarks, the matter was fully litigated and the violation found is closely related to that alleged in the complaint.

employees and pledges to oppose any attempt to organize them. Immediately on learning that the Union was attempting to organize the employees, Shelton sent a letter to all employees stating the Respondent's opposition to that effort. In addition to the violations of Section 8(a)(1) found, there were several other incidents which demonstrate the Respondent's union animus.

While not alleged as violations in the complaint, since they occurred more than 6 months before the charges on which the complaint is based were filed, they provide persuasive background evidence of the Respondent's willingness to violate the Act in its efforts to keep the Union out. I find that the uncontradicted evidence, discussed above, concerning Shelton's comments to Elkins about discussing things that happened at the plant in public, constituted interference with protected activity and also gave the impression that the employees' activities were under surveillance inasmuch as Elkins made the statements Shelton was referring to at a closed union meeting.

In September, shortly after David Downs returned to work after being injured and was assigned to work as a laborer, he was told by his supervisor, Bennie Turner, that Howell had heard that Downs ''was still discussing union and that he wasn't going to put up with it.'' On the following day, Downs was given a written disciplinary warning, the first he had ever received during his employment with the Respondent. Downs testified that he and some other employees had been assigned to sweep an area near the control room on a morning when visitors were expected at the plant. After working for about 2-1/2 hours, they took a break because they had gone beyond the usual morning breaktime by over 30 minutes. While they were taking their break in the control room, Turner came in and told them to leave and that they were not supposed to be taking a break. They went out and started a new job painting bricks. That afternoon Downs and the other employees were given the warnings for ''lack of efficiency and effort.'' They were given the warning notices by Supervisors Dennis Tynes and Steve York, who told them to read and sign the forms. Downs refused to sign because he felt that he had been doing his job. A short time later, Howell came and talked to Downs about the warning. Downs told him that he didn't think the warning was warranted because they had worked past the time they were due for a break and that if they wanted to get rid of him because he was active for the Union he should tell him. Howell said that was not the reason for the warning, that it was because they had been overlapping their brooms—they had 36-inch brooms and they were only sweeping 30-inch spots at a time. Downs again said that if Howell wanted to get rid of him, he should just say so. Howell said they were not trying to get rid of him but that Downs had not been the same since his accident.[3]

Turner was called as a witness by the Respondent. He did not specifically deny telling Downs that Howell had heard that Downs was still talking about the Union but did say he never talked to Downs about the Union while he was working on Turner's shift. Downs' testimony about this incident was credible and persuasive and I credit it over Turner's monosyllabic answer to a leading question by the Respondent's counsel. Turner testified that Downs and the others were assigned to sweep up near the control room where the visitors were expected about 8 a.m. After Turner left them to do something else, he returned to find them gone and the job unfinished. He found them taking a break and asked them why they couldn't finish the job before taking a break since visitors were coming in. After about 5 minutes, they went back out and finished sweeping. He reported the incident to his supervisor, Tynes, who issued written corrections to each of the employees involved. He was present when the correction notice was given to Downs, who was told that the reason was for leaving the work area before the job was done. The copy of the written correction in the record issued to Downs, dated September 18, is signed by Burnett and Howell and not by Tynes or Turner. Burnett first testified that he was not involved in this matter. When shown the form with his name on it, he said that he did not recall what had happened.

Howell was also called as a witness by the Respondent and gave a completely different account of how and why this warning was issued to Downs. According to Howell, Downs and others on the labor gang had been working on a cleanup project and Turner had complained to him that three men were doing the work of one. Howell observed them working ''for two or three days'' and found that ''they probably were not covering an area four feet wide with nine feet of broom.'' He determined that they should be given a writeup in order to get their attention. Howell also said that Turner complained that Downs would not stay on the job and every time he looked Downs was back in the furnace room. Turner's testimony fails to corroborate this.

The evidence presented by the Respondent to justify this warning to Downs cannot be reconciled. I find that Howell or Turner, or both, fabricated their testimony about the reasons for the disciplinary action taken against Downs. The evidence convinces me that the warning was part of what has been shown to be a continuing effort on the part of the Respondent to harass Downs in retaliation for his activity in support of the Union.

As was discussed above, when Downs went back to work in August after his work-related injury he was not returned to his regular position as a furnace operator notwithstanding the fact that he had been unconditionally released by both his own and the Company's physicians. The written release given Downs by Colburn, the company physician, specifically stated that Downs was released ''to return to work as an operator on 8–14–90.'' He was first told by Shelton that he was to be laid off, then was allowed to return but was assigned to work as a laborer. The Respondent's justification for this was Shelton's alleged concern that Downs ''did not react in a normal fashion'' to the material to which he was exposed in the spill, that at his return interview Downs first disclosed that he was taking a thyroid medication that the Respondent had not previously known about, that he was ''taking some sort of breathing therapy,'' and that additional investigation and a ''complete medical report'' were needed.

None of these reasons can withstand scrutiny. As noted above, the ''breathing therapy'' reason was a fabrication. The evidence shows that Colburn was aware that Downs had a

[3] Downs testified that Howell also referred to his not being the same ''since the union election.'' In an affidavit Downs gave the Board he did not mention Howell's reference to the union election in this conversation. He said he remembered the conversation and thought he had mentioned it to the Board agent, who had not written it down. I do not credit this part of Downs' testimony.

thyroid condition nearly a year before the accident. In any event, the Respondent was informed by Colburn on August 16 that the medication Downs was taking for that condition was not responsible for his reaction at the time of the accident. That leaves the self-serving testimony of Shelton that he needed further assurance that Downs would not be in danger if he returned to work as an operator. There was no evidence that Shelton has any medical training or any other expertise which would qualify him to question Downs' medical release. Nor was there any credible evidence to support the Respondent's contention that the release Downs was given by Colburn was not ''complete.'' There was nothing about the release that was conditional or to suggest that the physician felt that further investigation was necessary. I do not credit the testimony of Trivedi that he was told by Colburn to keep Downs in a ''low exposure job'' until there was a final report. According to Trivedi, he could not recall why he contacted Colburn after he had given Downs the release, but he proceeded to testify as to what ''might'' have been the reasons. When asked by him if Downs was ''okay to go back [to work,]'' Colburn said, ''we don't know yet.'' I simply did not believe this testimony, primarily, because I cannot believe that any qualified physician would so casually contradict and in effect revoke a written release he had just issued without either putting it in writing or informing the individual involved, but also because it was the Respondent, not the physician, who raised the issue of Downs' fitness to return to work. Not surprisingly, Colburn did not as appear as a witness to corroborate Trivedi's testimony. Finally, Trivedi testified that he did not actually speak to Colburn personally, but to an office worker at his clinic. I do not find this double hearsay evidence to be probative.

Although Shelton testified that one of the reasons he was concerned was that Downs had never been given ''a full allergy test,'' there was no evidence that the Respondent sought to have such testing done or received the results before it finally put Downs back to work as an operator. There was also no evidence that the ''complete medical report'' concerning Downs that the Respondent was supposedly waiting for was ever made. No such report was introduced by the Respondent. What it did introduce was a computer printout of the results of a blood test for Downs, dated October 12, on which, according to Trivedi, Colburn has written: ''OK to work, check liver enzymes in 3 mos.'' The words ''Final Report'' have also been written in on the form by an unidentified hand. The Respondent claims that the blood test form was the ''complete medical report'' that it had been waiting for since August. Clearly, the so-called report answers none of the questions Shelton claims to have been concerned about when he refused to let Downs return to work at his regular job as an operator. Apart from the blood test results, there is no evidence that any additional testing was done nor any suggestion that Colburn had any more information than at the time he gave Downs his original release. If anything, it is less complete than the original release which specified that Downs was released to work as an operator.

I find the foregoing evidence creates the inference, which I draw, that the Respondent's alleged concern about Downs' reaction to the chemical spill and its requirement that it get a more complete medical report explaining his reaction and assuring that he was fit to work as an operator was a pretextual attempt to justify its putting Downs in a menial job in retaliation for his activity in support of the Union.[4]

Considering all of the foregoing, I find that there is ample evidence that the Respondent knew that Downs and Elkins were prominent supporters of the Union and that the hostility and opposition toward the Union manifested by the Respondent was ''strong enough to support a conclusion that the Respondent was willing to violate the law, by discriminating against its employees, in order to keep the Union out.'' *Raysel-IDE, Inc*., 284 NLRB 879, 880 (1987).

2. Disciplinary warning to David Downs

In December, Downs was given a written correction as a result of a spill which occurred on November 21, after he had returned to the position of furnace operator. Downs testified that while running the furnace he had to change from one tank to another at about 10:30 a.m. He went to the tank farm where he unhooked a hose in the middle of the line and attached to another tank. He took the other part of the hose which was attached to the first tank and threw it over next to the barge, a large container where waste water is stored. At about 3:30 p.m., he was told by another operator that there had been a spill at the tank farm and that it was Downs' fault. The evidence indicates that the valve at the tank was defective and that Downs had not put a cap on the hose which resulted in the spill. Downs testified that Burnett told him to go out to the tank farm to see Shelton, who asked him if he had unhooked the hose and thrown it over the wall. When Downs said that he had, Shelton said that he had done it intentionally, that he was not doing his job as an A operator, and that he was fired. Trivedi arrived and told Shelton that there was nothing in the tank but rainwater and that it was not a reportable spill. Shelton then told Downs to go back to whatever he was supposed to be doing. He heard nothing more about it until December 4, the day he and McMakin were given written corrections because of the spill.

I find the evidence is sufficient to support an inference that this disciplinary action was taken against Downs because of his activity in support of the Union. That activity and the Respondent's knowledge of it are well established as is the fact that Downs had previously been a target of retaliation because of it. There was evidence that spills such as this were not uncommon, but that no similar disciplinary action had been taken against anyone before. During the course of the discussion at the time the warnings were presented to the employees, Shelton made the statement about holding a grudge because of the union campaign.

I also find that the Respondent has not established that it would have taken the same action in the absence of protected activity by its employees. Although Downs testified that he had taken the same action in unhooking hoses on numerous

[4] It appears that the fact that the Union had been in contact with Shelton about putting Downs back as an operator had as much to do with that happening as this medical report. Downs was informed that he was being returned to his job as an operator at his October 14 meeting with Shelton, which began with Shelton asking Downs a question about what kind of deal Downs had with union representative Sills. Sills testified that he had contacted Shelton and the Respondent's attorney to insist that the Respondent honor its agreement that Downs be put back to work as an operator or the Union would refile charges and that the Respondent eventually complied.

occasions, the evidence establishes that he did not put a cap on the hose as he should have and had he done so there would not have been a spill even if the valve on the tank was defective. The Respondent has established that the requirement that all hoses be capped was in effect at the time of this incident. Also, although caps were on back order at the time, there was no evidence that no cap was available to Downs. These facts notwithstanding, the Respondent has presented no convincing evidence as to why it chose to start taking disciplinary action in this case, which involved a relatively minor spill of rainwater caused at least in part by a defective valve, when numerous other spills had gone unpunished.[5] Shelton's self-serving testimony that prior to this spill he and Trivedi had decided that there were too many spills and that they had to do something ''of a serious nature'' to get the employees' attention and that the next spill would be punished was not credible. If such a decision had been made, it is difficult to understand why the employees were not informed about it and why 2 weeks went by before the discipline was issued, when Downs had admitted at the time of the spill that he had thrown the uncapped hose over the wall. Moreover, given the harassment and threats that Downs had been subjected to since the election, it is a little too convenient that this unannounced policy change was invoked for the first time in an incident involving Downs. Considering all of the circumstances, the Respondent's explanation that it had to start somewhere and Downs was in the wrong place at the wrong time is not credible and does not serve to overcome the inference that it was motivated by animus toward the Union and Downs' activity in support thereof. Accordingly, I find that the written correction issued to Downs on December 4 was discriminatory and violated Section 8(a)(1) and (3) of the Act.

3. Layoffs of Downs and Elkins

David Downs and Franklin Elkins were both permanently laid off by the Respondent on February 26, 1991. The complaint alleges that their layoffs also violated Section 8(a)(1) and (3). The Respondent presented credible evidence that it had learned as early as September that it was facing the possibilty of reduced business or even closing down some of its operations when the Kentucky Department of Natural Resources gave it notice of intent to deny the operating permit for its incinerators. Although it pursued legal action to prevent the loss of the permit, it was also faced with a normal reduction in business around the first of the year, as well as the loss of some of its regular customers because of the uncertainty concerning its continued operation. Consequently, it reviewed its manpower requirements in order to determine the minimum number of people needed to operate each department. It does not appear that the General Counsel contends that the resulting layoffs did not have business justification and there was no evidence to establish that they went beyond what business conditions dictated.

The General Counsel does contend that the selection of Downs and Elkins for layoff over other less experienced employees was discriminatory. As is discussed above, I find there is ample evidence to support an inference that the Respondent was motivated by union animus in selecting Downs and Elkins, two of the most active and prominent supporters of the Union and two of only three furnace department employees to be laid off. I also find that the Respondent has not established by credible evidence that it would have taken the same action in the absence of protected activity on its employees' part. The evidence it presented amounts to little more than self-serving testimony by Shelton, Howell, and Burnett, without corroboration or supporting evidence, that Downs and Elkins were not as good workers as others who were not laid off, that they did not consider the employees' support for the Union in making the decision to lay them off, and there were other union supporters who were not laid off.

The fact that other employees who were supporters of the Union were not laid off or that, as in the case of McMakin, a supporter was subsequently promoted by the Respondent, is not sufficient to dispell the inference of unlawful motivation found here since ''it is well established that a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents.'' *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964).

Howell testified that in anticipation of the layoff he was asked by Shelton to go through each department and determine the bare minimum of employees needed to operate a shift. At the same time, he asked each department supervisor to rate each of his employees based on ''their abilities and their job performance'' and to pick the weakest ones to be laid off. Each supervisor provided him with a list of employees to be laid off. In the furnace department, it was Burnett who made the final decisions as to who would be laid off. Howell presented Burnett's recommendations to Shelton who ''gave the okay.''

In the case of Elkins, the evidence shows that since being employed in August 1989 he never had any disciplinary action taken against him, he received a series of scheduled wage increases during his first year of employment and was recommended for and recived an additional wage increase in October when he was promoted to the position of materials handler, notwithstanding the expressed reluctance of his supervisor, Salyers, to bring his name up to Shelton. Burnett, who determined that Elkins should be laid off, testified that he was a Class C operator. After he evaluated the four or five operators in that classification according to the same criteria, Elkins ranked last. He said that the criteria he used included an employee's job performance, how he got along with people, how he picked up on his job and any written warnings or corrections he had received. However, the only specific detail of this rating process that he mentioned with respect to Elkins was that he did not listen and thought he already knew things while the others ''would listen and would try to learn something.'' I do not credit Burnett's testimony. After first denying it, Burnett admitted that he knew

[5] The Respondent argues that the fact that only rainwater was spilled is irrelevant. It may well be, as it contends, that it treats all spills as ''a problem'' regardless of their severity. It still has to provide some basis for exercising its ''business judgment'' to treat this ''problem'' differently than the others. The severity of the spill is clearly a factor to be considered in assessing the Respondent's motivation where the action taken differs significantly from that in the cases of previous spills.

Elkins was a supporter of the Union.[6] He had at one point ordered Elkins off the Company's property when he had attempted to demonstrate for the Union there with a sign. While he said that other unnamed supervisors had the same criticism of Elkins, several were called as witnesses by the Respondent, but none testified about Elkins' work performance. The credible and uncontradicted testimony of Elkins establishes that his immediate supervisor, Salyers, had praised his work after the election while at the same time warning him that the Respondent was out to get him.[7] Further, the evidence shows that Elkins was classified as a ''material handler'' not as an operator, although he was being trained to run the furnace. The evidence shows he was promoted to the position of material handler, effective October 29, and was paid $8.50 per hour. The rate for a Class C operator was $9 per hour. It appears that Burnett either didn't really do any rating of the furnace room employees or that he grouped Elkins with a more skilled classification in order to put him at a disadvantage. Among the employees in the department who were not operators, there were at least eight with less experience than Elkins, six of whom were hired after the Respondent says that it began planning for the layoff.

Howell testified that he agreed with Burnett's decision that Elkins should be laid off. When asked about his observations of Elkins' work, he stated that Elkins' supervisors had told him that Elkins, was ''bugging'' them and ''getting smart.'' He did not elaborate or indicate how this resulted in a determination that Elkins was among the ''weakest'' employees. He also testified that even though he observed Elkins wearing union insignia and demonstrating for the Union near the Company's property and knew that he had been ordered off the property on the day of the election, he did not know that Elkins was a union supporter because he didn't know how anybody had voted. I did not find him to be a credible witness.

Shelton testified that he made the final decisions as to who would be laid off. He also testified that before he approved any layoff recommendation he talked to the employee's supervisors about his work, he personally observed his work performance, and he reviewed any warnings or disciplinary action in his personnel file, particularly, those relating to absenteeism.[8] Like Burnett, Shelton testified that Elkins was a Class C operator. He articulated none of the specific reasons or observations on which he relied in reaching his determination that Elkins should be laid off. He did make a reference to seeing Elkins in other areas of the plant when he was supposed to be in the furnace room. There was no evidence that Elkins was ever reprimanded or otherwise disciplined for being away from the furnace room at any time and Shelton's comment appears to be nothing more than an afterthought. I find the Respondent has not overcome the inference that Elkins was laid off because he engaged in protected activity and that his layoff was a violation of Section 8(a)(1) and (3). *Wright Line*, supra.

David Downs was a Class A furnace operator, the highest classification, denoting one who has advanced through the C and B classifications and by training and experience can take charge and handle ''any and all operations'' of the furnace. He had been an A operator since May 1989 and had trained several other operators. Prior to the union election he had never been the subject of any disciplinary action during his employment by the Respondent.

Unlike with Elkins, Burnett was able to provide some specific reasons for his decision that Downs should be laid off. He testified that Downs had a problem with not completing jobs. His examples of this were the incident in which Downs was warned for not capping a hose and the July spill that had resulted in his hospitalization where, according to Burnett, he failed to follow procedures by not reporting back to the shift supervisor. He said that Downs would start a job and then quit and go over and talk to someone, that Downs didn't get along with other employees and ''had a smart remark to say every time somebody said something to him,'' and that he sometimes needed closer supervision than others and cited the uncapped hose incident as evidence of this. Shelton testified that he agreed with the recommendation that Downs be laid off after observing his work on several occasions. He said that Downs was responsible for other people getting hurt in the July spill, that he had severe problems communicating and following instructions, as evidenced by the hose incident.

Burnett did not specify when he observed these alleged deficiencies in Downs' work performance. It is clear that they were never considered serious enough for the Respondent to do anything about them until after the Union appeared on the scene and Downs actively supported it, since his disciplinary record up until after the election was spotless. While both Burnett and Shelton stated that Downs was at fault in the case of the July spill, no disciplinary action was taken against him because of it and a report about the incident prepared by Metcalf, before Downs' union activity became apparent, placed no blame on him. Apart from the testimony of Burnett and Shelton, the Respondent offered no evidence suggesting that Downs was at fault for causing the spill or the injuries to the other employees. It appears that they simply siezed on this incident after the fact in order to justify Downs' layoff. The same is true of the spill in November. From all that appears, it was a minor incident, one of many spills that had occurred without disciplinary action being taken. It had no effect on the fortunes of McMakin, who re-

[6] While claiming ignorance of the union involvement of Downs and Elkins, two of its most prominent supporters during the election campaign, Burnett was able to identify several employees who were not laid off as known to him to be supporters of the Union. I find such selective knowledge is suspect and detracts from his credibility.

[7] On cross-examination by counsel for the General Counsel, Salyers was asked to comment on Elkins' work. While I found his answers generally non-responsive and evasive, he said nothing critical of Elkins.

[8] Shelton and Burnett claimed that they reviewed the warnings and other disciplinary actions in the employees' files as a part of the process they employed in determining who should be laid off. According to Shelton a warning is a serious matter, a ''last resort,'' which he must personally ''scrutinize'' and approve before it goes into the file. Counsel for the General Counsel introduced numerous warnings for absenteeism and other offenses taken from the files of furnace department employees who were not laid off. While I do not find these warnings sufficient to establish that Elkins, who had none, was the victim of disparate treatment in this regard, I do find the failure of both Shelton and Burnett to explain in any significant detail the part these warnings played in arriving at their decisions as to who the ''weakest'' employees were casts doubt on the credibility of their testimony concerning the process that led to those decisions.

ceived an identical written correction but was promoted a short time later, yet was used by the Respondent to effectuate Shelton's self-fulfilling prophesy that Downs' first mistake after returning to the furnace room would be his last. I do not credit the testimony of Burnett and Shelton as to why Downs was laid off. Considering the history of threats, harassment, and pretextual disciplinary action by the Respondent against him following the election campaign and his open support for the Union, coupled with its failure to provide a reasonable basis for the layoff of Elkins, another prominent union activist, and Shelton's statement that he held ''a grudge'' because of the union election, I find that the Respondent has not established by a preponderance of the credible evidence that Downs would have been laid off in the absence of protected activity on his part. Accordingly, I find that his layoff violated Section 8(a)(1) and (3).

CONCLUSIONS OF LAW

1. The Respondent, LWD, Inc., LWD Sanitary Landfill, Inc., and LWD Trucking, Inc., a single employer within the meaning of the Act, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act:

(a) By maintaining an illegal rule prohibiting employees from discussing wages.

(b) By telling an employee that he would be watched and that his first mistake would be his last.

(c) By telling an employee that it held a grudge because the Union attempted to organize its employees.

(d) By telling an employee that he was an unpopular subject to bring up to management because of his protected activity.

4. The Respondent violated Section 8(a)(1) and (3) of the Act:

(a) By issuing a disciplinary warning to David Downs on December 4, 1990, in retaliation for his having engaged in activity in support of the Union.

(b) By permanently laying off David Downs and Franklin Elkins on February 26, 1991, in retaliation for their having engaged in activity in support of the Union.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent did not engage in any unfair labor practices alleged in the amended complaint not specifically found.

THE REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

Having found that the Respondent permanently laid off employees David Downs and Franklin Elkins on February 26, 1991, in retaliation for their having engaged in protected activity and support of the Union, I shall recommend that the Respondent be required to offer them immediate and full reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed, and make them whole for any loss of earnings or benefits suffered by reason of the discrimination against them, plus interest. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, LWD, Inc., LWD Sanitary Landfill, Inc., and LWD Trucking, Inc., a single employer, Calvert City, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule prohibiting employees from discussing the amount of their paychecks with other employees.

(b) Threatening to retaliate against employees because of their union or other protected activities.

(c) Issuing disciplinary warnings to employees because of their union or other protected activities.

(d) Permanently laying off or otherwise discriminating against employees because of their union or other protected activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its rule prohibiting employees from discussing the amount of their paychecks with other employees.

(b) Offer to David Downs and Franklin Elkins immediate reinstatement to their former positions of employment, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of wages or benefits they may have suffered as a result of the discrimination against them, plus interest. Backpay and interest due hereunder shall be computed in the manner described in the remedy section of this decision.

(c) Expunge from its records any reference to the unlawful disciplinary warning issued to David Downs on December 4, 1990, and notify him that this has been done and that the warning will not be used against him in any way.[10]

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facilities in Calvert City, Kentucky, copies of the attached notice marked ''Appendix.''[11] Copies of the

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] *Sterling Sugars*, 261 NLRB 472 (1982).

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a

Continued

notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''